UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Nos. 99-5855, 99-6131

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THE HENRY BIERCE COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF A SUPPLEMENTAL ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court upon the petition of The Henry Bierce Company ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a supplemental order of the Board issued following this Court's order of remand in Henry Bierce Co v. NLRB, 23 F.3d 1101 (6th Cir. 1994). The Board's supplemental decision and order issued on May 28, 1999, and is reported at 328 NLRB No. 85. (SD&O 1-15, A 4-18.)[1]

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[1] Record references in this proof brief are to the original record, as follows: "SD&O" refers to the Board's Supplemental Decision and Order, which includes the administrative law judge's

The Board had jurisdiction over this case pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), as the Company is located in Akron, Ohio. The Board's supplemental order is a final order under Section 10(e) of the Act.

The Company filed its petition for review on June 25, 1999. The Board filed its cross-application on August 19, 1999. The petition and cross-application for enforcement were timely filed; the Act places no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and by subsequently dealing directly with an employee concerning terms and conditions of employment.

2. Whether the Board acted within its broad remedial discretion in directing the Company to bargain with the Union.

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supplemental decision. "D&O" refers the Board's earlier decision and order in this case. "Tr" refers to the transcript of the hearing before the administrative law judge; and "GCX" and "RX" refer to the General Counsel's and the Company's exhibits, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

A. Background; Without the Union's Knowledge, the Company Begins To Hire New Employees At Noncontractual, Unilaterally Established Terms

The Company is engaged in the sale and distribution of cement products, and operates a small hardware store in Akron, Ohio. The Company is operated by its general manager, David Bierce. Bierce's father, Lou, is the Company's president and owner. (SD&O 1-2, A 4-5; Tr 229-30, A 288-89, Tr 291, A 310 (Bierce).) In 1984, the Company's workforce included 6 employees, 5 yardmen and 1 truck driver, who had all been with the Company for a number of years and who had long been represented by the Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 348 a/w International Brotherhood of Teamsters, AFL-CIO ("the Union"). The Union also represented employees at some 130 other area cement operations, including about 50 members of a multiemployer bargaining association in which the Company had been a member since 1974. (SD&O 1, A 4, D&O 1 n.2, A 87 n.2; Tr 10, A 229, Tr 109-110, A 270-71 (DeStafano), Tr 292-295, A 310-13 (Bierce).)

In April 1984, a month before the then-current agreement between the association and the Union was to expire, the Company informed the Union that it had withdrawn from the association and would bargain separately. (SD&O 1, A 4, D&O 1 n.2, 87 n.2; Tr 292-94, A 310-12 (Bierce).) Union Business Agent Robert

DeStefano contacted David Bierce and, over the course of two meetings, the two men negotiated a new agreement. That agreement required the Company, as before, to make contributions to health-and-welfare and pension funds on behalf of each unit employee. The new agreement also included a provision requiring the Company to provide the Union with an opportunity to refer applicants whenever the Company intended to hire new employees, and to provide the Union with the names and addresses of all new hires. (SD&O 1, A 4; GCX 3, Arts. I, II, & III pp. 1-2, A 149-50, Tr 10-11, A 229-30 (DeStefano), Tr 294-95, A 312-13 (Bierce).) Consistent with past practice, the Union did not present the Company with a written agreement for execution until a year had elapsed. Bierce signed the agreement on June 5, 1985, agreeing that it was to apply retroactively to May 1, 1984. (SD&O 1, A 4; Tr 10-12, A 229-31, Tr 50, A 262 (DeStefano).)

During the 3-year term of that agreement, the Company continued to make required benefit-fund contributions and to remit to the Union dues that were automatically deducted from the paychecks of veteran unit employees. When three of those employees retired, however, the Company hired replacements on noncontractual terms: It covered the new employees under health-and-welfare and profit-sharing plans that the Company maintained for its nonunit employees, and made no contributions on the new employees' behalf to the union health-and-welfare and pension funds. In further violation of the agreement, the Company failed

to notify the Union of either the vacancies or the names and addresses of the new employees. (SD&O 1, A 4; Tr 35-49, A 247-61, Tr 88-9, A 267-68, Tr 91, A 269 (DeStefano), Tr 267, A 304, Tr 307-11, A 318-322, Tr 325-29, A 325-29 (Bierce), GCX 24, A 179.)

B. The Parties Engage in Negotiations for a New Contract; the Company Refuses To Execute a New Contract, but Continues To Apply the Old Contract's Terms to Its Veteran Employees

In April 1987, Union Business Agent DeStefano met with David Bierce on two occasions to negotiate a new agreement to replace the one expiring in May. The parties discussed changes with respect to wages and one or two other matters, and agreed that some provisions, including those concerning benefit-fund contributions, would be carried over into a new agreement. They were unable, however, to agree on other terms. (SD&O 1, A 4; Tr 19-22, A 234-37 (DeStefano), Tr 232-40, A 290-98, Tr 251, A 299 (Bierce).)

After the 1984-87 agreement expired, the Company continued to make benefit-fund contributions and union-dues payroll deductions for the 3 remaining veteran unit employees, but not for those employees whom it had hired on noncontractual terms. When 2 of the 3 veteran employees retired at the end of 1987, the Company continued to make fund contributions and to check off union dues for the third, Charles Morgan, but again hired replacements without notifying the Union and without making fund contributions on their behalf. (SD&O 1, A 4; D&O 6 n.22, A 97

n.22; Tr 27, A 239 (DeStefano), Tr 307-08, A 318-19, Tr 312, A 323, Tr 325-29, A 325-29 (Bierce), GCX 16, A 166-77, GCX 24, A 179.)

During the next 12 months, Union Business Agent DeStefano made a series of attempts to arrange for a meeting with Bierce to execute a written agreement, but was unsuccessful. (SD&O 1, A 4, D&O 4, A 92-94; Tr 27-30, A 239-42 (DeStefano), Tr 252, A 300 (Bierce).) In late August 1988, Bierce said that he wanted time to review the Union's draft agreement with his father before signing. Several weeks later, Bierce informed DeStefano that the Company had hired an attorney, Steven Nobil, who would be contacting DeStefano. (D&O 4, A 94; Tr 30-31, A 242-43 (Bierce).) DeStefano met with Nobil in late September, and a few days later, Nobil telephoned DeStefano and announced that the Company's position was that no final agreement had ever been reached. (SD&O 1, A 4; D&O 4, A 94; Tr 31-34, A 243-46 (Bierce).)

C. Without Prior Notice to the Union, the Company Polls Its Employees and They Vote Against Continued Union Representation; the Company Withdraws Recognition from the Union

In October 1988, employee Joseph Thompson complained to David Bierce about the Company's failure to provide work uniforms to him and the other employees hired since 1984. Thompson told

Bierce that the employees would have uniforms "if we were in the union."[2] Employee Alfred Boulton, who was standing nearby, intervened, and warned Thompson not to "screw up a good thing over something as stupid as uniforms [by] get[ting] the union in here." Bierce said nothing in response to Boulton's comment. (SD&O 1, A 4, D&O 4, A 94; Tr 186-87, A 279-80 (Boulton), Tr 265, A 302 (Bierce).) Bierce neither received nor overheard any other employee comments about the Union. (D&O 6, A 97; Tr 267, A 304 (Bierce).)

In early November, without prior notice to the Union, Bierce conducted a poll of the employees to determine their desire for continued union representation. The employees voted six to one against union representation. On November 9, the Company notified the Union that it was withdrawing recognition. (SD&O 2, A 5; Tr 283, A 307 (Summers), Tr 197, A 284 (Boulton), RX 6, A 180-86.)

On December 19, the Union filed an unfair labor practice charge, and on February 2, 1989, the Board's General Counsel issued a complaint, alleging that the Company's refusal to sign the written contract prepared by the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (GCX 1(a), A 136, GCX 1(e), A 137-39.)

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[2] Under the expired union contract, the Company was required to provide uniforms. (GCX 3, Art. III, § 6, A 150.)

D. The Company Attempts To Persuade Employee Morgan To Abandon Union Membership and Continue Working for the Company Under New, Nonunion Terms

In March 1989, Bierce summoned employee Charles Morgan to his office. There, Bierce said that he "wanted to talk to [Morgan] about taking [Morgan] out of the Union." Bierce told Morgan that the Company "was going to get out of the Union and . . . was trying to set up a program for [Morgan]" that would provide him with the same fringe and retirement benefits as Morgan would earn if he continued to work under the union plans. Morgan replied that it would have to be handled by an attorney. Bierce's father, Company President Lou Bierce, subsequently spoke to Morgan and confirmed that the Company had decided "to get out of the Union." President Bierce also told Morgan that he was the Company's only "union" employee, and that the Company was not "signing up anybody else in the Union." (SD&O 2, A 5; Tr 110-12, A 271-73 (Morgan).)

On July 31, 1989, the Union filed a second unfair labor practice charge, alleging that the Company violated the Act by "inform[ing] an employee that it was ridding itself of the Union and [by] deal[ing] directly with said employee over benefits, including his retirement, and other terms and conditions of employment." (GCX 1(h), A 141.) Thereafter, the General Counsel issued a new complaint adding an allegation of direct dealing. (D&O 1, A 86-87.)

II. THE EARLIER PROCEEDINGS

A. The Board's Original Decision and Order

In its original Decision and Order, the Board (Chairman Stephens, Members Devaney and Oviatt) affirmed the administrative law judge's procedural ruling permitting the General Counsel, on the final day of the hearing, to amend the complaint to allege that the Company's polling of its employees and withdrawal of recognition from the Union violated Section 8(a)(5) and (1) of the Act. (D&O 1, A 82, D&O 8-9, A 102-106.) On the merits, the Board found that the Company did not commit an unfair labor practice by refusing to execute the contract, because "there was no meeting of the minds on the . . . material provisions in the Union's draft." (D&O 8, A 101.) However, the Board concluded that the Company's poll violated Section 8(a)(5) and (1) on two independent grounds. First, the Board found that because the Company proffered "only one negative employee comment as evidence that employee attitudes toward the Union had changed," the Company did not have a reasonable doubt, based on objective considerations, that the Union had lost majority support. (D&O 1 n.3; A 82 n.3.) Thus, the Company failed to provide the type of evidence that would have justified subjecting an established collective-bargaining relationship to a poll. Second, on uncontested evidence, the Board found that the Company had failed to meet the requirement that it provide the Union with reasonable

advance notice of the time and place of the poll. (D&O 1, A 82-83.)

Because the Company based its decision to withdraw recognition from the Union on the results of the unlawful poll, the Board concluded that the withdrawal of recognition was also a violation of Section 8(a)(5) and (1) of the Act. (D&O 12, A 112.) Finally, because the withdrawal of recognition was unlawful, the Board found that the Company's subsequent direct dealing with Charles Morgan also violated the Act. (D&O 12-13, A 113-14.)

B. This Court's Decision

On review, this Court (Judges Martin, Boggs, and Senior Judge Krupansky) enforced the Board's order in part and remanded in part. Henry Bierce Co. v. NLRB, 23 F.3d 1101 (6th Cir. 1994). The Court affirmed the Board's holding that the poll was unlawful because the Company had not given advance notice to the Union. 23 F.3d at 1108-09. Accordingly, the Court also agreed with the Board that the poll "may not serve as the basis for the [C]ompany's withdrawal of union recognition and subsequent direct dealing." 23 F.3d at 1104.

The Court, however, remanded to the Board for further consideration its determination that the Company engaged in unlawful direct dealing with employee Morgan. The Court stated that because the Board had not given the Company prehearing notice of the polling and withdrawal of recognition allegations,

the Company had not had the opportunity or incentive to show that it had a reasonable, good-faith doubt that the Union enjoyed majority support--a showing that would have been a complete defense to the allegations of withdrawal of recognition and direct dealing. 23 F.3d at 1110.

Finally, characterizing the Company's polling as a violation of Section 8(a)(1) (29 U.S.C. § 158(a)(1)) alone, rather than of Section 8(a)(5) and (1) (29 U.S.C. § 158(a)(5) and (1)), as the Board had found, the Court declined to enforce the Board's order that the Company bargain with the Union. 23 F.3d at 1110. The Court stated: "because we are remanding this case to the Board for further findings on the direct dealing charge, we see no reason why the bargaining order should remain in force based solely on the Section 8(a)(1) poll violation." 23 F.3d at 1110. The Court remanded the issue of an appropriate remedy to the Board. 23 F.3d at 1110.

III. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

After the remand, the Board itself remanded the proceeding to the administrative law judge for a supplemental hearing, at which the Company was given the opportunity to introduce evidence--apart from the unlawful poll--in support of its defense that it lawfully withdrew recognition from the Union, and therefore did not violate the Act when it dealt directly with employee Morgan. (SD&O 9, A 12.)

At the supplemental hearing, the Company offered the testimony of only one witness, General Manager David Bierce. After reviewing Bierce's testimony, the judge found that it failed to show that the Company possessed a reasonable, good-faith belief, based on objective evidence apart from the poll results, that the Union lacked majority support at the time of the Company's direct dealing with employee Morgan. (SD&O 4-6, A 7-9.) The Board (Chairman Truesdale and Member Fox, Member Brame dissenting in part) affirmed that finding. Accordingly, the Board concluded, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by withdrawing recognition from the Union in November 1988 and by subsequently dealing directly with employee Morgan. (SD&O 6; A 9.)

The Board's supplemental order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board's order requires the Company to recognize and bargain with the Union and, if agreement is reached, to embody that agreement in a signed document. The Board's order also requires the Company to post copies of a remedial notice. (SD&O 7, 14; A 10, 17.)

SUMMARY OF ARGUMENT

It is undisputed that the Company's General Manager, David Bierce, and the Company's owner, Lou Bierce, each attempted to convince employee Morgan to abandon his union membership and continue working for the Company under new, nonunion terms. Because substantial evidence supports the Board's finding that the Company's earlier unilateral termination of its bargaining relationship with the Union was unlawful, this direct dealing with Morgan was also unlawful.

With respect to the withdrawal of recognition issue, the Company failed to establish that it had a reasonable, objectively based good-faith belief that the union no longer enjoyed majority support. As an initial matter, the Company did not introduce any new, material evidence at the supplemental hearing. Accordingly, the Company simply failed to take advantage of the opportunity to show that, apart from its unlawful poll of the employees, it had evidence warranting a good-faith doubt of the Union's majority status when it withdrew recognition. In any event, the Company failed to show that its asserted doubt of the Union's majority status was based on the unit employees' manifestations of their views. See Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 368-71 (1998), or that its doubt was asserted in good faith.

Instead, the Company relies largely on the Union's failure to protest the Company's continuous disregard for employee and

union rights under the collective-bargaining agreement. As the Board reasonably found, the Company failed to follow the contractual referral system or to notify the Union of additional hires, and there was no evidence that either the Union or the employees themselves knew that the Company was acting in disregard of the agreement. Accordingly, there is no reason to believe the employees ever knew they were entitled to be paid contractual wages and benefits; even if they did, their failure to complain does not demonstrate their views regarding union representation.

Moreover, for sound policy reasons, the Board rejected the Company's attempt to base its doubt of the Union's majority status on the Union's lack of response to the Company's own bad-faith conduct. The cases relied upon by the Company in defense of its conduct all involve employers who acted in good faith, and not, as here, with an intent to undermine an existing collective-bargaining relationship.

The Board also did not abuse its broad remedial discretion in imposing the status quo ante remedy of a bargaining order for the two Section 8(a)(5) violations in this case. The Board's remedy "is not a Gissel bargaining order." (SD&O 7, A 10.) A Gissel bargaining order establishes a new bargaining relationship between a union and a stranger employer. It puts the union in a better position than it occupied before the employer's unlawful conduct. See NLRB v. Williams Enterprises,

Inc., 50 F.3d 1280, 1289 (4th Cir. 1995). By contrast, the bargaining order here merely requires the Company to resume compliance with the preexisting bargaining obligation that it unlawfully repudiated. The Supreme Court has recognized that, in such situations, a bargaining order is the appropriate remedy. Franks Bros. Co. v. NLRB, 321 U.S. 702, 705 (1944). This Court, too, has long accepted that a bargaining order is the "customary remedy" in those situations. NLRB v. Hollaender Mfg. Co., 942 F.2d 321, 327-328 (6th Cir. 1991), cert. denied, 502 U.S. 1093 (1992). See NLRB v. Aquabrom, 855 F.2d 1174 (6th Cir. 1988), clarified and amended, 862 F.2d 100 (6th Cir. 1988); McLean v. NLRB, 333 F.2d 84, 88-89 (6th Cir. 1964). To hold otherwise would reward the Company for unlawfully disrupting the bargaining relationship and denying to its recent hires the wages and benefits of its last union contract.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM THE UNION AND BY SUBSEQUENTLY DEALING DIRECTLY WITH AN EMPLOYEE CONCERNING TERMS AND CONDITIONS OF EMPLOYMENT

A. Introduction; the Allegation of Direct Dealing Turns Upon the Legality of the Company's Prior Withdrawal of Recognition from the Union

It is well settled that an employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by dealing directly with an employee rather than his bargaining representative concerning the employee's terms and conditions of employment. Medo Corp. v. NLRB, 321 U.S. 678, 683-84 (1944) (obligation to bargain "exacts the negative duty to treat with no other"); Master Touch Dental Labs, Inc. v. NLRB, 405 F.2d 80, 83 (2d Cir. 1968). Here, it is undisputed that General Manager David Bierce and his father, Company President Lou Bierce, each attempted to convince employee Morgan to accede to working for the Company under new, nonunion terms. Those discussions were plainly unlawful unless, at the time, the Company had lawfully terminated its bargaining relationship with the Union. Because, as we now show, the Company unlawfully terminated its bargaining relationship with the Union, the Board's finding that the Company

engaged unlawful direct dealing with Morgan is entitled to affirmance.[3]

B. The Company Unlawfully Withdrew Recognition from the Union

1. Applicable principles and standard of review

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." A union that has demonstrated its majority support, either through a Board-supervised election or by the employer's lawful voluntary recognition, enjoys a presumption of continuing majority status. During the term of a collective-bargaining agreement, that presumption is, absent extraordinary circumstances, irrebuttable. Auciello Iron Works v. NLRB, 517 U.S. 781, 786 (1996). At the expiration of a collective-bargaining agreement, the presumption of continued majority status becomes rebuttable. NLRB v. Washington Manor, Inc., 519

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[3] It is the Board's view that, in expressly remanding the issue of direct dealing, the Court understood that its disposition would require the Board to consider the legality of the Company's withdrawal of recognition. For, as the Board noted (SD&O 6 n.35, A 9 n.35), had the Court determined that the Company's withdrawal of recognition was not unlawful, the Court would have simply reversed the direct dealing finding rather than remanding it. In any event, and contrary to the Company's contention (Br 49-50) that the withdrawal of recognition was not remanded, it is sufficient to note that the Court "did not address the finding . . . and so the Board was not precluded from considering [it] on remand." NLRB v. Williams Enterprises, 50 F.3d 1280, 1287 n.3 (4th Cir. 1995) (citing Quern v. Jordan, 440 U.S. 332, 347 n.18 (1979)).

F.2d 750, 751-52 (6th Cir. 1975). The employer may overcome the presumption, and lawfully withdraw recognition from an incumbent union, if it shows either (1) that the union has in fact lost majority support, or (2) that it has a reasonable, objectively based good-faith belief that the union no longer enjoys majority support. Auciello Iron Works v. NLRB, 517 U.S. at 786-87; NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 775-78 (1990).

Whether the employer has met its burden under either test is a question of fact. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 778 & n.2 (1990). The Board's findings must therefore be upheld if supported by substantial evidence. Section 10(e) of the Act (29 U.S.C. § 160(e)). Straight Creek Mining, Inc. v. NLRB, 164 F.3d 292, 297 (6th Cir. 1998); Bolton-Emerson, Inc. v. NLRB, 899 F.2d 104, 106 (1st Cir. 1990) (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951)).

Under the foregoing principles, the Union, which had represented company employees for about 14 years, was entitled to a rebuttable presumption of majority status after expiration of the 1984-87 collective-bargaining agreement. There is no dispute that the Company withdrew recognition from the Union in November 1988. Consequently, if substantial evidence supports the Board's finding that the Company lacked a good-faith doubt of the Union's majority status at that time, its withdrawal of recognition violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). As we now show, the Board reasonably

rejected the Company's attempt to demonstrate that it had an objective basis for such doubt.

2. The Company did not rebut the presumption of the Union's continuing majority status

In its earlier decision, the Court recounted the following facts:

> In late September or early October 1988, [David] Bierce heard one employee say to another employee that if they wanted to "ruin a good thing," they could join a union. In addition, from 1984 to 1988 there had been a high turnover rate among the company's employees, and many of the new employees did not "check off" union dues contributions when they began work. No grievances were filed against the company during this period, and the union failed to appoint a new shop steward after the steward voluntarily retired in 1987.

23 F.3d at 1105. The Company now says that those facts are sufficient to support a finding that the Company had a reasonable, objectively based good-faith belief that the union no longer enjoyed majority support. The Company, however, cannot be correct: if the evidence adduced prior to the remand had been sufficient to establish a good-faith doubt defense, the Court would simply have ruled in the Company's favor on the direct dealing allegation. Instead, as shown above, the Court remanded that allegation to the Board because the Company had not had "an adequate opportunity to introduce evidence in [its] defense . . . ." 23 F.3d at 1110.

When the Board afforded the Company that opportunity at the supplemental hearing, it added no material facts to the record. Rather, the Company's evidence consisted solely of the brief

testimony of David Bierce, who had previously testified at the initial hearing. The administrative law judge reasonably found (SD&O 12; A 15) that Bierce's testimony "was basically nothing more than a 'rehash' of evidence" introduced at that earlier hearing. The Board agreed. Thus, as the Board stated (SD&O 4, A 7), the Company's "complete failure to introduce any legally significant additional evidence on remand leads to the conclusion that, under the [C]ourt's view of the case, the [Company] has failed to establish this defense." Accordingly, on that basis alone, the Board is entitled to enforcement of the withdrawal of recognition and direct dealing violations.

In any event, the Company fails to make an adequate showing that its asserted doubt of the Union's majority status was based on manifestations of the unit employees' views regarding the Union. See Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 368-71 (1998). The only employee statement that the Company mustered to show a change in employee attitude toward the Union--employee Boulton's warning to employee Thompson not to "screw up a good thing over something as stupid as uniforms [by] get[ting] the union in here" (Tr 265, A 302 (Bierce))--is as much an expression of interest in union representation (employee Thompson) as it is of a lack of interest (employee Boulton). Bierce acknowledged that no one else complained about the Union or indicated any dissatisfaction with the Union. (Tr 264, A 301, Tr 267, A 304 (Bierce).)

Instead, the Company now attempts to base its asserted doubt of the Union's majority status largely on the Union's failure to protest the Company's continuous disregard of employee rights under the contract. Thus, the Company concedes that, starting in 1984, it began hiring new employees in breach of the union referral provision of the contract, and without complying with its contractual obligation to notify the Union of either the vacancies or the new hires. (SD&O 1, A 4; Tr 324-25, A 324-25, Tr 328-30, A 328-30, 341-43, A 331-33 (Bierce), Tr 350-51, A 334-35 (DeStefano)). Once hired, those new employees were paid below-contract wages and benefits. Although the employees did not complain about the contractual breaches, the Board reasonably found (SD&O 4, A 7) that there was no reason to believe that the employees ever knew they were entitled to be paid the contractual wages and benefits, and no reason to believe that the Union ever knew that noncontractual employees had been hired. In any event, and as the Board also found (SD&O 4, A 7), even if these employees knew of their entitlement and nonetheless passively accepted their lot, it does "nothing to demonstrate those employees' own views regarding union representation." See NLRB v. Flex Plastics, Inc., 726 F.2d 272, 275 (6th Cir. 1984).

Moreover, the Board also found--for sound policy reasons--that it was important not to accord probative weight to evidence of the Union's failure to protest the Company's contract violations. See Allentown Mack Sales and Service, Inc. v. NLRB,

522 U.S. 359, 378 (1998) (the Board "can, of course, forthrightly and explicitly adopt counterfactual evidentiary presumptions . . . as a way of furthering particular legal or policy goals").

As the Board stated (SD&O 5, A 8), "as a matter of policy, to find the [Company] could establish its good-faith doubt of the Union's majority status through its bad faith in failing to carry out its various contractual commitments would be antithetical to the Act's purposes of promoting industrial peace and furthering collective bargaining." Acceptance of such evidence, the Board further stated (SD&O 5, A 8), would "provide employers with an incentive to violate their collective-bargaining agreements" and would "vitiate the statutory objective of industrial peace." See Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 785 (1996) ("[t]he object of the [Act] is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees"). Accord Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 38 (1987).

The Company also tries to make something of the fact that the newly hired employees did not authorize the Company to deduct union dues directly from their paychecks. That argument must fail, however, for it appears that the new employees did not know either of the union contract in general or the dues checkoff in particular. Moreover, as the Board and the courts have often observed, an employee's choice not to have dues automatically

deducted does not establish that the employee is not a union member, and, as the Board found here (SD&O 4, A 7), is even less probative of whether the employee did or did not support the Union. See Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 490 (2d Cir. 1975) ("disinclination to join the union does not imply opposition to the union as bargaining representative"); Terrell Machine Co. v. NLRB, 427 F.2d 1088, 1091 (4th Cir.), cert. denied, 398 U.S. 929 (1970); Washington Manor Nursing Center (North), 211 NLRB 324, 329 (1974), enforced, 519 F.2d 750 (6th Cir. 1975); Gulfmont Hotel Co., 147 NLRB 997, 1001-02 (1964), enforced, 362 F.2d 588 (5th Cir. 1966).[4]

The Company also points to the fact that no new union steward was appointed after the then-steward's retirement in December 1987; that the Union failed to submit to its membership for ratification the agreement that was assertedly reached between the Union and the Company in 1987; and that the Union did not file grievances. The first two matters, as the Board properly found, are "purely internal union matters and beyond the

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[4] The Company makes the related contention (Br 41-42) that the Union did not seek to enforce its contractual right to have employee dues automatically deducted. However, when the Union's contractual right to a dues checkoff expired with the expiration of the 1987 agreement (Trico Products Corp., 238 NLRB 1306 (1978)), the Union knew it was obtaining dues from what it thought was the entire bargaining unit. (Tr 27, A 239, Tr 62, A 264 (DeStefano), Tr 373-74, A 347-48 (Bierce).) Once again, the Company seeks to base its good-faith doubt on its bad-faith conduct of having, by that time, secretly hired 4 additional employees in derogation of its obligation to notify the Union and use the Union's referral system.

[Company's] purview." (SD&O 5, A 8). See McLean v. NLRB, 333 F.2d 84, 88 (6th Cir. 1964) ("[a]lthough the union's conduct in neglecting to negotiate during an eight month period, was certainly not exemplary, it seems to us that it constituted more of a violation of duty owing to its members than to McLean"). And the failure of the Union to file grievances does not establish that the Union abandoned the employees or vice versa in the absence of a showing that substantial numbers of employee grievances actually existed and were ignored. See Club Cal-Neva, 231 NLRB 22 (1977).

The Company's attempt to transform its critique of the Union's performance into employee concern over that performance, however, rings hollow, especially where, as here, "the employer has consistently and deliberately denied the employees the benefits of the contract" and even knowledge of their entitlement to those contractual benefits. (SD&O 5, A 8.) See generally Auciello Iron Works v. NLRB, 517 U.S. 781, 790 (1996) ("The Board is entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the wokers if they want to file one.")

In addition, as this Court has emphasized, before an employer may claim that union "inaction" supports a good-faith doubt of continued majority status, the employer must consider all of the circumstances, and not just those that support a claim

of inaction. See NLRB v. Flex Plastics, Inc., 726 F.2d 272, 275 (6th Cir. 1984); NLRB v. Washington Manor, Inc., 519 F.2d 750, 752 (6th Cir. 1975). Here, as the Board noted (SD&O 5, A 8), the Company overlooked evidence showing that the Union had not abandoned the bargaining unit.

Thus, the Union was actively engaged in three sets of contract negotiations on behalf of the unit between 1984 and 1987. The Union negotiated the 1984-87 agreement. Then, in 1986, Union Business Agent DeStefano met with David Bierce and negotiated a 40-cents-per-hour wage increase under the wage reopener provision of that agreement. (Tr 295-96, A 313-14 (Bierce).) In early 1987, Bierce and DeStefano met twice to negotiate a successor agreement. While DeStefano thereafter became occupied with other union matters, including, among other things, negotiating 14 other collective-bargaining agreements and conducting a strike against another employer, DeStefano turned his attention to the Company once again in August 1988 when he presented Bierce with a written contract to sign.[5] Those activities demonstrate that the Company's claim of union inaction is not "sufficiently mindful of all the circumstances . . . ." NLRB v. Flex Plastics, Inc., 726 F.2d 272, 275 (6th Cir. 1984).

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[5] See Pennex Aluminum Corp., 288 NLRB 439, 441 (1988) (inaction for 2 years after the last negotiating session was "explained by factors other than loss of employee support"), enforced mem., 869 F.2d 590 (3d Cir. 1989).

Nonetheless, the Company claims (Br 31) that its counsel correctly advised it to withdraw recognition based on the Board's decisions in White Castle System, Inc., 224 NLRB 1089 (1976); Lloyd McKee Motors, Inc., 170 NLRB 1278 (1968); Arkay Packaging Corp., 227 NLRB 397 (1976), affirmed sub nom. New York Printing Pressmen and Offest Workers Union, No. 51 v. NLRB, 575 F.2d 1045 (2d Cir. 1978); Viking Lithographers, Inc., 184 NLRB 139 (1970); and Glenlynn, Inc d/b/a/ McDonald's Drive-In Restaurant, 204 NLRB 299 (1973). As we show below, there are individualized distinctions between each of those cases and this case. But the overarching distinction, which the Company completely overlooks, is that the employer in each of those cases dealt in good faith with its employees' union. Here, by contrast, the Company hired employees without, as required by the contract, using the union referral system or even notifying the Union of their existence once they came onboard. Then, when those newly hired employees did not either know to complain about the many contract breaches, or simply chose not to complain, the Company seized upon this "inactivity" and claimed the Union was defunct. What is evident is that the Company adopted a course of conduct calculated to undermine the existing collective-bargaining relationship. By contrast, in the cases the Company relies upon, the unorchestrated facts furnished the employers with the requisite good-faith doubt of majority status.

In White Castle, for example, "the union had been essentially inactive, union representatives themselves had intimated that the union lacked majority support, and a majority of employees had indicated to the employer that they did not support the union." Pennsylvania State Education Association--NEA v. NLRB, 79 F.3d 139, 150 (D.C. Cir. 1996). In Lloyd McKee Motors and Viking Lithographers, the employers' pre-withdrawal conduct was found specifically to be free of union animus. In Arkay Packaging Corp., the union abandoned the unit when many of the jobs were filled with replacement workers, at a time when the Board did not presume that replacement workers favored union representation to the same extent as the strikers. See NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 780-781 (1990) (discussing Arkay). And, in Glenlynn, as the First Circuit observed, no real collective bargaining relationship ever existed, and there was independent evidence of employee dissatisfaction with the union. NLRB v. West Sand and Gravel Co., 612 F.2d 1326, 1331 & n.6 (1st Cir. 1979).

In sum, the Company's "doubt" of the Union's majority status, when viewed against the backdrop of the Company's calculated efforts to deprive the employees and the Union of their rights, can hardly be said to have been advanced with the requisite good faith. See Bally Case and Cooler, Inc. of Delaware v. NLRB, 416 F.2d 902, 905-05 (6th Cir. 1969), cert. denied, 399 U.S. 910 (1970). The Board therefore reasonably

concluded that the Company violated the Act when it withdrew recognition from the Union, and when it subsequently dealt directly with employee Morgan.

II. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DIRECTING THE COMPANY TO BARGAIN WITH THE UNION

A. Applicable Principles

Section 10(c) of the Act (29 U.S.C. § 160(c)) expressly authorizes the Board, upon finding a violation of the Act, to order the violator not only to cease and desist from the unlawful conduct, but "to take such affirmative action . . . as will effectuate the policies of th[e] Act." The basic purpose of a Board remedial order is "to restore, so far as possible, the status quo that would have obtained but for the wrongful act." NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 265 (1969). Moreover, "in devising a remedy the Board is not confined to the record of a particular proceeding," but may rely on its "'[c]umulative experience.'" NLRB v. Seven-Up Bottling Co. of Miami, 344 U.S. 344, 349 (1953) (citation omitted).

The Board's power to fashion remedies is "a broad discretionary one, subject to limited judicial review." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964). The Board's choice of remedy "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943). In particular, "[b]ecause the relation of remedy to

policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). See also Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 & n.11 (1989).

B. The Instant Case

Having found that the Company's withdrawal of recognition from the Union and its subsequent direct dealing with employee Morgan violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)), the Board ordered, as the appropriate remedy, the Company to recognize and bargain in good faith with the Union. In so doing, the Board was mindful of the Court's rejection of a bargaining order in this case when the only violation affirmed was a Section 8(a)(1) polling violation. The Board was equally mindful of the Court's assumption that any future bargaining order in this case would be reviewed under the standards for a Gissel bargaining order. 23 F.3d at 1110, discussing NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

Accordingly, in its Supplemental Decision and Order, the Board took pains to explain that the bargaining order issued here "is not [actually] a Gissel bargaining order." (SD&O 7, A 10.) The bargaining order here "merely requires the [Company] to resume compliance with its preexisting bargaining obligation,

which it had repudiated without a lawful basis." It does not, like a Gissel bargaining order, establish a new bargaining relationship between a union and a stranger employer. Indeed, this Court has recognized elsewhere that a Gissel bargaining order--based on an authorization card majority and an employer's misconduct during an election campaign--is wholly distinct, and involves separate considerations, from a bargaining order rectifying an unlawful withdrawal of recognition. See NLRB v. Aquabrom, 855 F.2d 1174, 1186 (6th Cir. 1988) (Gissel bargaining orders, unlike the withdrawal of recognition bargaining order, can be viewed as "vulnerable to the passage of time and employee turnover"), clarified and amended, 862 F.2d 100 (6th Cir. 1988); NLRB v. Creative Food Design Ltd., 852 F.2d 1295, 1303 (D.C. Cir. 1988)("To import the Gissel calculus into [a refusal-to-bargain case] deprives the duly recognized union of the presumptions to which it is entitled"). See also Straight Creek Mining, Inc. v. NLRB, 164 F.3d 292, 297 (6th Cir. 1998); NLRB v. Michigan Rubber Products, 738 F.2d 111, 113 (6th Cir. 1984), and cases cited. We now show that the Board's order is well within its broad remedial discretion.

For more than 50 years, a bargaining order has been the standard Board remedy for an employer's unlawful withdrawal of recognition from an incumbent union. Williams Enters., 312 NLRB 937, 940-942 (1993), enforced, 50 F.3d 1280 (4th Cir. 1995), and cases cited. The Supreme Court first approved the Board's

issuance of a bargaining order in these circumstances in NLRB v. Lorillard Co., 314 U.S. 512, 512-514 (1942), and reiterated that approval in Franks Bros. Co. v. NLRB, 321 U.S. 702, 705 (1944).

This Court, too, has long accepted that a bargaining order is the "customary remedy" when the employer's refusal to bargain arises in the context of a challenge to the union's majority status. NLRB v. Hollaender Mfg. Co., 942 F.2d 321, 327-28 (6th Cir. 1991), cert. denied, 502 U.S. 1093 (1992). See NLRB v. Aquabrom, 855 F.2d 1174 (6th Cir. 1988), clarified and amended, 862 F.2d 100 (6th Cir. 1988); McLean v. NLRB, 333 F.2d 84, 88-89 (6th Cir. 1964).[6]

As the Board explained (SD&O 7, A 10), the bargaining order in a withdrawal-of-recognition situation is a straightforward attempt to restore "the status quo ante" that existed prior to the employer's unlawful conduct. A status quo ante remedy is not considered an extraordinary remedy requiring detailed case-specific justification, for the traditional purpose of any remedy is to "restor[e] the economic status quo that would have obtained but for the [c]ompany's wrongful refusal to [bargain]." NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969). Prior to such a refusal, as shown above (pp. 17-18), an incumbent union

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[6] This is also the law in many other circuits as well. NLRB v. Williams Enterprises, Inc., 50 F.3d 1280, 1289 (4th Cir. 1995); Louisiana-Pacific Corp. v. NLRB, 858 F.2d 576, 578-79 (9th Cir. 1988); Toltec Metals, Inc. v. NLRB, 490 F.2d 1122, 1124-26 (3d Cir. 1974); NLRB v. Cayuga Crushed Stone, Inc., 474 F.2d 1380, 1383-84 (2d Cir. 1973).

enjoys a rebuttable presumption of majority status by virtue of the employees' earlier decision to select it as their bargaining representative. Where an employer refuses to bargain but fails to rebut the presumption, the refusal is unlawful and the presumption remains intact. That presumption "'establishes, without more, the employer's duty to bargain.'" NLRB v. Creative Food Design Ltd., 852 F.2d 1295, 1300 (D.C. Cir. 1988)(citation omitted).

In such circumstances, as the Board emphasized (SD&O 7, A 10), an order requiring the employer to bargain simply restores the union to the position it would have enjoyed but for the employer's unlawful conduct. NLRB v. Williams Enterprises, Inc., 50 F.3d 1280, 1289 (4th Cir. 1995). A bargaining order with that purpose is well within the Board's remedial discretion. Ron Tirapelli Ford, Inc. v. NLRB, 987 F.2d 433, 445 (7th Cir. 1993)("a bargaining order is the appropriate remedy to return the parties to the status quo ante").

In contrast, a non-incumbent union--the typical status of the union in a Gissel case--never enjoyed a presumption of majority status. Thus, an affirmative order to bargain under Gissel grants the beneficiary union a better position--initial recognition as the bargaining agent--than it had before the employer's unlawful conduct. See NLRB v. Williams Enterprises, Inc., 50 F.3d 1280, 1289 (4th Cir. 1995). Accordingly, the Company's reliance (Br 55-56) on cases involving analysis of

bargaining orders under NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), is misplaced.

In any event, even in the Gissel context, it has been recognized that certain unfair labor practices, often called "hallmark" violations, are so coercive that, absent significant mitigating circumstances, they will support the issuance of a bargaining order without extensive explication. See NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 212-213 (2d Cir. 1980); cf. Amazing Stores, Inc. v. NLRB, 887 F.2d 328, 331 (D.C. Cir. 1989), cert. denied, 494 U.S. 1029 (1990). The Board could reasonably conclude that an unlawful general refusal to bargain, which was described in Sullivan Industries v. NLRB, 957 F.2d 890, 900 (D.C. Cir. 1992), as "a particularly egregious kind of [Section] 8(a)(5) violation," is functionally equivalent to the "hallmark" violations that presumptively warrant a Gissel bargaining order.[7]

[7] The facts of this case plainly demonstrate the aggravated nature of the Company's misconduct. As shown above, there can be no doubt but that the Company committed itself to an unlawful course of conduct to rid itself of the Union. Moreover, the Company's entire case for a good-faith doubt of the Union's majority status--the Union's alleged inactivity--is based on its own misconduct. Had the Company not secretly violated its contract with the Union, its new employees' attitudes towards the Union would have taken account of the wages and benefits of the union contract--which those employees would have been receiving--and the ancillary benefits of union representation. In addition, had the Union known earlier of the Company's unlawful conduct, the Union would have had the opportunity to take steps to compel the Company to honor the agreement. A refusal to approve a bargaining order in this case would effectively reward the Company for sabotaging the collective-bargaining relationship.

The Company contends (Br 57-58) that this Court should follow NLRB v. Albany Steel, Inc., 17 F.3d 564, 572 (1994), where the Second Circuit directed the Board to remedy an employer's unlawful withdrawal of recognition by holding a new election. But that case is directly at odds with the Supreme Court's settled principle--followed in this Circuit--that an election is inappropriate until the wrongdoing employer has remedied its misconduct by bargaining for a reasonable period of time. Franks Bros. Co. v. NLRB, 321 U.S. 702, 705-706 (1944). In Albany Steel, moreover, the employer asserted, in good-faith, objective indicia of the union's loss of majority support. Here, by contrast, the Company intentionally disrupted the bargaining relationship and deprived its new hires of any potential relationship with the Union. Having "disrupt[ed] the employees' morale, deter[red] their organizational activities, and discourage[d] their [union] membership" for all that time (Franks Bros. Co. v. NLRB, 321 U.S. at 704), the Company itself has destroyed any possibility that the employees could express their "true, undistorted desires" about union representation if an election were held before the Company remedied its misconduct. See also Caterair International, 322 NLRB 64, 67 (1996) (unlawful refusal to bargain foreseeably leads employees "to become disenchanted with the union, because it apparently can do nothing

for them")[8]; Lee Lumber & Building Materials Corp. v. NLRB, 117 F.3d 1454, 1458 (D.C. Cir. 1997) (upholding Board presumption that refusal to bargain taints union's subsequent loss of majority).[9]

Sanctioning a vote to decertify the Union in this atmosphere plainly would allow the Company to profit from the "predictably adverse effects of its wrongdoing." See Franks Bros. Co. v. NLRB, 321 U.S. at 704. Accord NLRB v. A.W. Thompson, Inc., 449 F.2d 1333, 1336-1337 (5th Cir. 1971), cert. denied, 405 U.S. 1065 (1972). That, in turn, would foreseeably tempt other employers to refuse to bargain with incumbent unions, in the hope of reaping similar reqards. Franks Bros. Co. v. NLRB, 321 U.S. at 704-705 ("[t]he Board might well think that, were it not to adopt [a bargaining order as a] remedy, but instead order elections," then other "recalcitrant employers" might also be tempted to "postpone performance of their statutory obligation" to bargain). Such a result would undermine the goal of "industrial peace" that

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[8] The Company (Br 53) is obviously in error in reading the D.C. Circuit decision in Caterair Int'l v. NLRB, 22 F.3d 1114 (D.C. Cir.), cert. denied, 513 U.S. 1015 (1994), as rejecting the subsequent Board decision in Caterair International, 322 NLRB 64 (1996).

[9] After a lengthy hiatus in bargaining, the union may need time simply to reestablish its ties with bargaining unit employees. Van Dorn Plastic Machinery Co. v. NLRB, 939 F.2d 402, 405 (6th Cir. 1991). Cf. NLRB v. Americare-New Lexington Health Care Ctr., 124 F.3d 753, 758 (6th Cir. 1997) ("the Board was not unreasonable to find that decertification elections can be so disruptive that it is necessary to allow a subsequent period 'free from distraction' in which to negotiate").

lies at the heart of the Act's purpose. NLRB v. Creative Food Design Ltd., 852 F.2d at 1300. Accord Bishop v. NLRB, 502 F.2d 1024, 1028 (5th Cir. 1974)(it would be "anomalous and disruptive of industrial peace" to allow employers "to dissipate the union's strength, and then to require a new election" (citations omitted)).

In addition, as the Board observed in Caterair, 322 NLRB at 67, a bargaining order protects the right of the present employees to choose for or against continued representation on the basis of "a fair opportunity to assess what their . . . representative can . . . accomplish for them through [the collective-bargaining] process." See IUE v. NLRB, 426 F.2d 1243, 1249 (D.C. Cir. 1970) ("[e]mployee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining").

Accordingly, the decertification bar "does not involve any injustice to employees," who may wish to remove their union, because the bar does not "fix a permanent bargaining relationship" between the union and the employer. Franks Bros. Co. v. NLRB, 321 U.S. at 705. After "a reasonable period" of time has passed, the employees are free to express their views through the Board's election procedures or through other proper means. Id. at 706. Accord Poole Foundry & Machine Co. v. NLRB, 192 F.2d 740, 742-743 (4th Cir. 1951)(after "a reasonable period" of good faith bargaining by employer, employees "are free to file

a decertification petition"), cert. denied, 342 U.S. 954 (1952). See also Gissel, 395 U.S. at 613.

Contrary to the Company (Br 55-56), post-withdrawal events are irrelevant to the propriety of a bargaining order in withdrawal of recognition cases. See NLRB v. Buckley Broadcasting Corp., 891 F.2d 230, 234-35 (9th Cir. 1989), cert. denied, 496 U.S. 925 (1990). As this Court has emphasized, "[t]he relevant date to look to in determining the bona fides of the employer's doubts is the date that recognition is withdrawn; subsequent events cannot validate an improper withdrawal of recognition." NLRB v. Hollaender Mfg. Co., 942 F.2d 321, 325 (6th Cir. 1991) (quoting NLRB v. Pennco, Inc., 684 F.2d 340, 342 (6th Cir.), cert. denied, 459 U.S. 994 (1982)), cert. denied, 502 U.S. 1093 (1992). Accord Straight Creek Mining, Inc. v. NLRB, 164 F.3d 292, 297 (6th Cir. 1998).

Thus, contrary to the Company's suggestion (Br 56), "the sole fact of turnover can never justify denying a bargaining order for simple refusal-to-bargain violations." NLRB v. Creative Food Design, Ltd., 852 F.2d 1295, 1301 (D.C. Cir. 1988). Moreover, an unlawful general refusal to bargain is not the kind of unfair labor practice whose effect on employee free choice diminishes with the passage of time. Indeed, because an unlawful refusal to bargain inevitably deprives a union of employee support by preventing the union from doing anything for employees, the longer the period without bargaining, the greater

the likelihood that employees will abandon their support for the union. See NLRB v. Aquabrom, 855 F.2d 1174, 1186 (6th Cir. 1988), clarified and amended, 862 F.2d 100 (6th Cir. 1988); NLRB v. Michigan Rubber Products, 738 F.2d 111, 113 (6th Cir. 1984).

In any event, the Supreme Court has repeatedly rejected delay as a defense to a Board remedial order. See NLRB v. Katz, 369 U.S. 736, 748 n.16 (1962); NLRB v. Rutter-Rex Mfg., Co., 396 U.S. 258, 265 (1969). See also Consolidated Freightways v. NLRB, 892 F.2d 1052, 1059 (D.C. Cir. 1989) (6 years elapsed between Court's remand and Board's supplemental order), cert. denied, 489 U.S. 817 (1990); NLRB v. Wallkill Valley Gen. Hosp., 866 F.2d 632, 637 (3d Cir. 1989) (7-year delay between judge's decision and Board's decision); El Torito-La Fiesta Restaurants, Inc. v. NLRB, 929 F.2d 490, 491-96 (9th Cir. 1991) (enforcing Board's bargaining order, following remand, after 6 years). To the extent that the passage of time has had an impact on the employees' support for the Union here, it is a direct result of the Company's unlawful termination of collective bargaining.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment denying the petition for review and enforcing the Board's supplemental order in full.

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